



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[Docket No. FHWA-2019-0013]

Renewal Package from the State of Texas to the Surface Transportation Project Delivery Program and Proposed Memorandum of Understanding (MOU) Assigning Environmental Responsibilities to the State

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of proposed MOU and request for comments.

SUMMARY: This notice announces that FHWA has received and reviewed a renewal package from the Texas Department of Transportation (TxDOT) requesting participation in the Surface Transportation Project Delivery Program (Program). This Program allows for FHWA to assign, and States to assume, responsibilities under the National Environmental Policy Act (NEPA), and all or part of FHWA's responsibilities for environmental review, consultation, or other actions required under any Federal environmental law with respect to one or more Federal highway projects within the State. The FHWA has determined the renewal package to be complete, and developed a draft renewal MOU with TxDOT outlining how the State will implement the Program with FHWA oversight. The public is invited to comment on TxDOT's request, including its renewal package and the proposed renewed MOU, which includes the proposed assignments and assumptions of environmental review, consultation, and other activities.

DATES: Please submit comments by [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Facsimile (Fax): 1-202-493-2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor Room W12-140, Washington, DC 20590-0001.
- Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, Washington, DC 20590 between 9:00 a.m. and 5:00 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

For FHWA: Tom Bruechert by email at tom.bruechert@dot.gov or by telephone at 512-536-5948. The FHWA Texas Division Office's normal business hours are 8 a.m. to 4:30 p.m. (Central Time), Monday-Friday, except for Federal holidays. For the State of Texas: Sue Theiss by email at Sue.Theiss@txdot.gov or by telephone at 512-416-2591.

State business hours are the same as above although State holidays may not completely coincide with Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may submit or retrieve comments online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours each day, 365 days each year. Please follow the instructions. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: <http://www.archives.gov> and the U.S. Government Publishing Office's Web page at: <http://www.access.gpo.gov/nara>.

Background

Section 327 of title 23, United States Code (23 U.S.C. 327), allows the Secretary of DOT to assign, and a State to assume, the responsibilities under the NEPA of 1969 (42 U.S.C. 4321 et seq.) and all or part of the responsibilities for environmental review, consultation, or other actions required under certain Federal environmental laws with respect to one or more Federal-aid highway projects within the State. The FHWA is authorized to act on behalf of the Secretary with respect to these matters.

The TxDOT entered the Program on December 16, 2014, after submitting its application to FHWA, obtaining FHWA's approval, and entering into a MOU in accordance with 23 U.S.C. 327 and FHWA's application regulations for the pilot program (23 CFR part 773). On November 8, 2018, after coordination with FHWA,

TxDOT submitted the renewal package in accordance with the renewal regulations in 23 CFR 773.115.

Under the proposed renewal MOU, FHWA would assign to the State, through TxDOT, the responsibility for making decisions on the following types of highway projects:

1. All Class I, or environmental impact statement projects, both on the State highway system (SHS) and local government projects off the SHS that are funded by FHWA or require FHWA approvals.

2. All Class II, or categorically excluded projects, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.

3. All Class III, or environmental assessment projects, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.

4. Projects funded by other Federal agencies (or projects without any Federal funding) of any Class that also include funding by FHWA or require FHWA approvals. For these projects, TxDOT would not assume the NEPA responsibilities of other Federal agencies.

Excluded from assignment are highway projects authorized under 23 U.S.C. 202 and 203, highway projects under 23 U.S.C. 204 unless the project will be designed and constructed by TxDOT, projects that cross State boundaries, and projects that cross or are adjacent to international boundaries.

The assignment also would give TxDOT the responsibility to conduct the following environmental review, consultation, and other related activities:

Air Quality

- Clean Air Act (CAA), 42 U.S.C. 7401-7671q, with the exception of any conformity determinations

Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- Compliance with the noise regulations in 23 CFR part 772

Wildlife

- Endangered Species Act of 1973, 16 U.S.C. 1531-1544
- Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
- Anadromous Fish Conservation Act, 16 U.S.C. 757a -757f
- Fish and Wildlife Coordination Act, 16 U.S.C. 661- 667d
- Migratory Bird Treaty Act, 16 U.S.C. 703 -712
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801 et seq., with Essential Fish Habitat requirements at 16 U.S.C. 1855(b)(1)(B)

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. 300101, et seq.
- Archeological Resources Protection Act, 16 U.S.C. 470aa-mm
- Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C. 469 - 469c

- Native American Grave Protection and Repatriation Act, 25 U.S.C. 3001-3013; 18 U.S.C. 1170

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 1996
- Farmland Protection Policy Act, 7 U.S.C. 4201- 4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251-1387 (Section 401, 402, 404, 408, and Section 319)
- Coastal Barrier Resources Act, 16 U.S.C. 3501-3510
- Coastal Zone Management Act, 16 U.S.C. 1451-1466
- Safe Drinking Water Act, 42 U.S.C. 300f- 300j-26
- General Bridge Act of 1946, 33 U.S.C. 525-533
- Rivers and Harbors Act of 1899, 33 U.S.C. 401-406
- Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3921
- Wetlands Mitigation, 23 U.S.C. 119(g), 133(b)(14)
- Flood Disaster Protection Act, 42 U.S.C. 4001- 4130

Parklands and Other Special Land Uses

- 23 U.S.C. 138 and 49 U.S.C. 303 (Section 4(f)) and implementing regulations at 23 CFR 774
- Land and Water Conservation Fund Act, 16 U.S.C. 4601-4 -- 4601-

FHWA-Specific

- Planning and Environmental Linkages, 23 U.S.C. 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135.
- Programmatic Mitigation Plans, 23 U.S.C. 169 with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135

Executive Orders (E.O.) Relating to Highway Projects

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 CFR sections 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (aka “One Federal Decision”)
- E.O. 13112, Invasive Species

The proposed renewal MOU would allow TxDOT to continue to act in the place of FHWA in carrying out the environmental review-related functions described above, except with respect to government-to-government consultations with federally recognized

Indian Tribes. The FHWA will retain responsibility for conducting formal government-to-government consultation with federally recognized Indian Tribes, which is required under some of the listed laws and executive orders. The TxDOT will continue to handle routine consultations with the Tribes and understands that a Tribe has the right to direct consultation with FHWA upon request. The TxDOT also may assist FHWA with formal consultations, with consent of a Tribe, but FHWA remains responsible for the consultation. The FHWA and TxDOT have received requests for formal consultations with several Tribes regarding the proposed renewal of the MOU and currently are engaged in ongoing consultations. The TxDOT also will not assume FHWA's responsibilities for conformity determinations required under Section 176 of the CAA (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.

The MOU content reflects TxDOT's desire to continue its participation in the Program without any changes (that is, no new responsibilities were requested). The FHWA and TxDOT have agreed to modify some of the provisions in the MOU to: establish the monitoring process required by the permanent Program; accommodate changes specified in Section 1308 of the Fixing America's Surface Transportation Act; clarify the role of the U.S. Department of Justice and FHWA in settlements and appeals; and to make the renewed MOU notice and review time frames consistent with other States in this Program.

A copy of the proposed renewal MOU and renewal package may be viewed on the docket at www.regulations.gov, as described above, or may be obtained by contacting

FHWA or the State at the addresses provided above. A copy also may be viewed on TxDOT's Web site at: <https://www.txdot.gov/inside-txdot/division/environmental/nepa-assignment.html>. The FHWA Texas Division, in consultation with FHWA Headquarters, will consider the comments submitted when making its decision on the proposed MOU revision. Any final renewal MOU approved by FHWA may include changes based on comments and consultations relating to the proposed renewal MOU and will be made publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 327; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 40 CFR 1507.3, 1508.4.

Issued on: June 25, 2019.

Nicole R. Nason,
Administrator,
Federal Highway Administration.

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